

***United States Court of Appeals
for the Second Circuit***



APPENDIX

74-1565

**United States Court of Appeals
FOR THE SECOND CIRCUIT**

Docket No. 74-1565

UNITED STATES OF AMERICA,

Appellee,

—against—

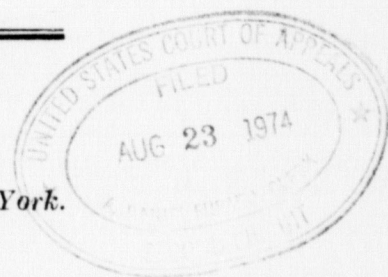
FRANCISCO SOLIMENE,

Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

GOVERNMENT'S APPENDIX

DAVID G. TRAGER,
*United States Attorney,
Eastern District of New York.*



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GOVERNMENT'S APPENDIX ON APPEAL

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73CR 575
ROSLING, J. MISHLER, J.

transportation of heroin with intent to distribute

DATE	PROCEEDINGS
-16-71	Before DOOLING, J.-Indictment filed.
22/71	Magistrate's file 71 M 1746 inserted in criminal file.
3 13/71	BEFORE WEINSTEIN, J. Case Called - Deft SOLIMENE and counsel present-Deft BOYCE present without counsel-Defts BONNETTI and AVERSO not present-Bench warrants outstanding-Defts BOYCE and SOLIMENE arraigned and enter pleas of not guilty-Bail as to deft SOLIMENE reduced to \$200,000.00.
2/30/71	Govt's Notice of Readiness for trial filed.
14/72	Before ROBLING, J. - Case called. Felice BONNETTI & joseph AVERSO not present. Marked ready- subject.
9-72	Bench Warrants Issued (Bonnetti & Averso)
4/72	Before ROSLING, J. - Case called. Deft SOLIMENE and atty present. Motion for reduction of bail argued. Denied.

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DATE	PROCEEDINGS
-17-72	Petition for Writ of Habeas Corpus Ad Testificandum filed. (Jose Francisco San Martin)
-17-72	By Bartels J. - Writ Issued, ret. 2-28-72)
-24-72	Petition for Writ of Habeas Corpus Ad Testificandum filed
-24-72	By Rosling J - Writ Issued, ret. 2-28-72 (Guillermo Gonzalez)
2-2-72	Before Rosling J - Case called - Defts BOYCE & SOLIMENE & counsels present - defts BONNETTI & AVERSO not present - Bench Warrants outstanding Deft SOLIMENE moves for reduction of bail - Motion denied; Case marked ready and passed (Defts Boyce & Solimene in custody)
2-2-72	Before Rosling J - Case called - No appearances - adjd to March 1, 1972.
3-1-72	Before Rosling J - Case called - Marked ready & passed to 3-2-72
3-2-72	Before Rosling J - Case called - Marked ready & passed to 3-6-72 at 10 AM.
3-6-72	Before ROSLING, J. - Case called - Defts & their attorneys not present. Case marked ready & set for 3-7-72 at 10 AM.
3-6-72	Notice of Appeal filed asto deft SOLIMENE regarding reduction of bail.
3-7-72	Docket entries and duplicate of Notice of Appeal mailed to the Court of Appeals (Solimene)
3-7-72	Before ROSLING, J. - Case called - Attorneys & defts not present. Case set for trial for 3-8-72 at 10 AM by the Court.
3-8-72	Before ROSLING, J. - Case called - Defts & attorneys not present. Case set for trial for 3-9-72 at 10 AM.
-9-72	Before Rosling J - Case called - answered Ready - Trial Begun - application by T. Rosenberg, atty for deft Boyce, was made for a change of venue - Motion denied - also to try this case 2 months from this date - Denied - Motion to suppress to be resumed on March 13, 1972 and also Jury selection Trial to be continued on March 13, 1972.
2-14-72	Certified copy of Judgment received from Court of Appeals affirming the judgment of this court (deft FRANCISCO SOLIMENE reduction of bail) filed.
3-13-72	Before ROSLING, J. - Case called - Hearing on a motion to suppress resumes Defts BOYCE & SOLIMENE and their attorneys present. Hearing on a motion to suppress concluded. Court denied the motion to suppress. Trial to resume on 3-14-72 at 10 A.M.
3-13-72	Before ROSLING, J. - Case called - Trial resumes. Defts BOYCE & SOLIMENE and their attorneys present. Jury drawn & sworn. Trial to resume 3-14-72 at 10 A.M.
3-14-72	Before ROSLING, J. - Case called - Trial resumes. Defts BOYCE & SOLIMENE and their attorneys present. Counsel for BOYCE made an application to the court for the withdrawal of a juror and for a mistrial - court denied the

71CR 1281
CRIMINAL DOCKET

DATE	PROCEEDINGS	A 3
	application. (Counsel for deft SOLIMENE joined with in the application for a mistrial) Trial to resume 3-15-72 at 10 A.M.	
3-15-72	Before ROSLING, J. - Case called - Trial resumes - Trial to resume 3-16-72 at 10 A.M.	
3-16-72	Before Rosling J - Case called - Trial resumed - Trial to be continued to March 17, 1972 at 10:00 am.	
3-17-72	BEFORE ROSLING, J. - Case called - Trial resumes. An application was made by counsel for deft BOYCE for a severance. Court denied the application. Trial to resume 3-20-72 at 10 A.M.	
3-20-72	Before Rosling J - Case called - Trial resumed - Defts present with counsels - Counsel for deft Boyce moves for dismissal, for a mistrial and that testimony be stricken from the record and for Judgment of Acquittal - Court denied all motions - Counsel for deft Solimene joins in motions - denied - Both defts renew their application for Judgment of Acquittal and Mistrial -Denied - On application of Asst US Atty Bashian XXXXXX Overt Act #14 is withdrawn - Court granted the application - Trial to be continued on Mar. 21, 1972.	
3-21-72	Before ROSLING, J. - Case called. Trial resumes. - Defts BOYCE & SOLIMENE and their attorneys present. Theodore Kreager, Attorney for deft BOYCE made an application to the court for a mistrial on the grounds of "New York Times" clippings and also the "Daily News" clippings pertaining to drugs, etc. Court denied the applications. Both defendants renewed their motions for dismissal and for judgment of acquittal and for mistrial. Court denied both defendants applications. Trial to resume on March 22, 1972 at 10 A.M.	
3-22-72	Before ROSLING, J. - Case called. Trial resumes. - An application was made by counsel for deft SOLIMENE for a mistrial as to the Judge's charge. Court denied the application. An application was made to the court by counsel for deft BOYCE for a mistrial as to the written memorandum of the court submitted to the jury. Court denied the application. Jury returned and entered a verdict of GUILTY as to both defts as charged. Jury polled at the application of counsel for deft SOLIMENE. On application of asst US atty Bashian bail as to deft SOLIMENE increased to \$750,000.00 cash or surety. Bail as to deft. BOYCE remained the same. Trial concluded. Sentence adjourned without date as to both defts. All motions are reserved until the time of sentence.	
3-22-72	By ROSLING, J. - Order of sustence filed.	

DATE	PROCEEDINGS	A	4
5-31-72	Writ of Habeas Corpus Ad Testificandum as to defts JOSE FRANCISCO SAN MARTIN & GUILLERMO GONZALEZ returned & filed - executed.		
5-19-72	Before Rosling J - Case called- Defts SOLIMENE & BOYCE present with counsels - Both defts made motions to set aside the verdict and adjourning sentence etc. Motions denied - deft Solimene is sentenced to imprisonment for a term of 15 years and a special parole term of 15 years. Deft BOYCE sentenced to imprisonment for 15 years - sentence to commence immediately and a special parole term of 10 years.		
5-19-72	Judgment & Commitment filed for defts BOYCE & FRANCISCO SOLIMENE - Certified copies to Marshal.		
5-19-72	Before Rosling J - Case called - Deft SOLIMENE & counsel present. Deft BOYCE present - counsel not present - Er Theodore Rosenberg, Esq. represented both defendants. Both defts refused to file a Notice of Appeal in forma pauperis.		
5-25-72	Notice of Appeal filed (BOYCE)		
5-25-72	Notice of Appeal filed (SOLIMENE)		
5-25-72	Docket entries and duplicate of Notice of Appeal mailed to the C of A (defts BOYCE & SOLIMENE)		
5-26-72	Petition for Writ of Habeas Corpus Ad Prosequendum filed. (Boyce)		
5-26-72	By Dooling J - Writ Issued, ret. May 30, 1972 (Boyce)		
5-1-72	Writ returned and filed - executed (Boyce)		
9-11-72	4 Volumes of stenographers transcripts filed (pgs 1 to 1267)		
9-12-72	Record on Appeal certified and handed to Theodore Krieger, Esq. for delivery to the Court of Appeals.		
9-14-72	Acknowledgment received from C of A and filed for receipt of record on appeal.		
1/12/73	3 Petitions for Habeas Corpus Ad Testificandum filed. (for AMERICO ALTAMIRANO, CESAR ALTAMIRANO and RAFAEL RICHARD)		
1/12/73	By ROSLING, J. - Writ issued ret. 1/26/73 .		
1-15-73	Magistrate's file 73 M 7 inserted into CR file		
1/26/73	Before ROSLING, J. Case called- Deft and his atty present- Case marked ready -Notice not to be sent out sooner than 3/2/73-Bail cont'd.		
1/30/73	Notice of Appearance filed.		
1/31/73	Notice of Motion for Bill of Particulars, Discovery and Suppressing Evidence (J. ROSLING, has papers)		
2/14/73	Affidavits of G. BASHIAN and RUBEN AMERICO ALTAMIRANO filed.		
2/9/73	Before ROSLING, J. - Case called on motion for a bill of particulars- Marked off-No appearance on behalf of the deft.		

DATE	PROCEEDINGS	A	5
2-16-73	Index to Record on Appeal retd from the Court of Appeals.		
2-16-73	Letter from C of A undated requesting that Index to Record be returned to that office in connection with Writ of Certiorari.		
	Record returned		
2/21/73	XXXXXXXXXXXX Acknowledgment of receipt of Index to Record on Appeal filed. (LOUIS BOYCE)		
3/9/73	Petition for Writ of Habeas Corpus Ad Testificandum filed (AVERSO)		
3/9/73	By ROSLING, J. Writ issued ret 3/22/73		
3/15/73	Affirmation Requesting Adjournment filed. (HAEETZ)		
3/17/73	Petition for Writ of Habeas Corpus Ad Prosequendum filed (AVERSO)		
3/17/73	By ROSLING, J.- Writ issued, ret. 3/30/73.		
3-23-73	Writ retd and filed - Executed (Rafael Richard)		
XH			
3/22/73	Judgment recd and filed from the C. of A. affirming the Judgment of Court.		
3/30/73	Before ROSLING, J.- Case called- Deft and his atty present- Adjd 4/13/73 at 2:15 P.M.		
4/3/73	Writ retd and filed. Executed. (AVERSO)		
4-6-73	Notice of Motion and Memorandum of Law filed by deft AVERSO to quash the search warrant issued, etc. or granting a hearing on the motion to suppress (J. Rosling has papers)		
4/10/73	By ROSLING, J.- Order filed, that the motion to suppress is referred to the judge who will preside at the trial of the charge for hearing immediately before the commencement of the trial.		
4/13/73	Before ROSLING, J.- Deft's motion for adjournment of trial to May 1973 adjd without date.		
4/23/73	Before MISHLER, CH. J.- Case called- Adjd to 5/7/73 at 9:30 A.M. consent.		
4/23/73	Affirmation requesting adjournment filed		
5/2/73	Letter dated 3/24/73 filed from deft F. SALIMENE.		
5/2/73	By CATTOGGIO, MAG. - Memorandum filed, in regard to deft SALIMENE letter of 3/24/73.		
5-7-73	Before Mishler, Ch J - Case called - deft Joseph Averso & counsel Frederick Hafetz present - May 21, 1973 for Trial.		
5/10/73	Petition for Writ of Habeas Corpus Ad Testificandum filed.		
5/10/73	By MISHLER, CH. J.- Writ issued, ret. 5/14/73.		
5/14/73	Petition for Writ of Habeas Corpus Ad Testificandum filed.		
5/14/73	By MISHLER, CH. J.- Writ issued, ret. 5/15/73.		

DATE	PROCEEDINGS	A	6
5-15-73	Writ ret'd and filed - Executed (JOSEPH AVERSO)		
5-17-73	Writs ret'd and filed. Executed. (AVERSO)		
5-21-73	Before Mishler, Ch J - Case called - deft AVERSO & counsel Frederick Hafetz present - disposition of case adj'd to June 1, 1973 at 2:00 PM.		
5-22-73	Writ ret'd and filed. Executed.		
6-1-73	Before MISHLER, CH. J.- Case called- Adj'd to 6/15/73 on the govt's applic		
6-7-73	Petition for Writ of Habeas Corpus Ad Prosequendum filed (J. AVERSO) & (F. Hafetz)		
6-7-73	By MISHLER, CH. J.- Writ issued ret. 6/15/73 .		
6-15-73	Before Mishler, Ch J - Case called - deft AVERSO & counsel F. Hafetz present - deft withdraws his plea of not guilty and enters a plea of guilty - sentence adj'd without date		
6-19-73	Writ ret'd and filed. Executed. (AVERSO & SOLIMENE)		
7-17-73	Petition for Writ of Habeas Corpus Ad Testificandum filed (AVERSO)		
7-17-73	By Mishler, Ch J - Writ Issued, ret. July 19, 1973 (AVERSO)		
7-27-73	Writ returned, filed-, Executed (Deft. Averso)		
8-17-73	Before, MISHLER, CH. J.- Case called- Sentence adj'd to Oct. 19, 1973 at 10:00 AM. (JOSEPH AVERSO)		
9-11-73	By MISHLER, CH. J.- Corrected Bench Warrant ordered/issued- Bench warrant filed and inserted into the criminal file		
9-12-73	Affidavit of GEORGE BASHIAN, JR. filed.		
11-12-73	Certified copy of Order received from Supreme Court and filed denying Deft Boyce and Deft Solimene's petition for writ of certiorari		
1-16-74	Before MISHLER, CH J - sentence adj'd without date on consent (AVERSO)		
2-30-74	Before MISHLER, CH J. - case called - sentence adj'd to Feb. 1, 1974 on consent (AVERSO)		
2-1-74	Before MISHLER, CH J - case called - deft Joseph Averso not present - counsel F. Hafetz present - sentence adj'd to 2-22-74 on consent.		
2-4-74	Notice of motion for reduction of sentence filed (Forwarded to Judge Mishler) (Francisco Solimene)		
2-22-74	Before MISHLER, CH. J.- Case called- Deft and counsel present- Deft sentenced to a term of imprisonment for a period of 3 years and a special parole of 10 years (AVERSO)		
2-22-74	Judgment and Commitment filed- certified copies to Marshal (AVERSO)		
3-11-74	By MISHLER, CH J - Memorandum of Decision and Order filed denying motion of deft Solimene for reduction of sentence imposed. Copy mailed to the deft as per Order.		
3-26-74	Notice of Appeal filed (from denial of motion for reduction of sentence as to deft SOLIMENE)		

ONLY COPY AVAILABLE

A 7

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

73M 7
71011262

UNITED STATES OF AMERICA

INDICTMENT

73 M 7

- against -

FELICE BONNETTI, LOUIS BOYCE,
also known as Louie, FRANCISCO
SOLIMENE and JOSEPH AVERSO,

Crim. No. _____
(Title 21, United States
Code, Section 841(a)(1),
§846, §952(a))

Defendant.

FILED
IN CLERK'S OFFICE
U. S. DISTRICT COURT E.D. N.Y.

THE GRAND JURY CHARGES:

★ DEC 16 1971 ★

On or about and between the 28th day of May 1971, and
the 9th day of July 1971, both dates being approximate and
inclusive, within the Eastern District of New York and elsewhere,
the defendant FELICE BONNETTI, the defendant LOUIS BOYCE, also
known as Louie, the defendant FRANCISCO SOLIMENE, the defendant
Joseph Averso, and Benito Brondarbit, also known as Jose
Francisco San Martin, named herein as a co-conspirator but not
as a co-defendant, Americo Altamirano, named herein as a co-
conspirator but not as a co-defendant, Cesar Altamirano, named
herein as a co-conspirator but not as a co-defendant, Rafael
Richard, named herein as a co-conspirator but not as a co-defendant,
Guillermo Gonzalez, named herein as a co-conspirator but not as a
co-defendant, Hector Castro, named herein as a co-conspirator but
not as a co-defendant, and Carlos Ramirez, named herein as a
co-conspirator but not as a co-defendant, did willfully combine
and conspire to commit the following offenses, to wit:

1. To knowingly and intentionally import into the United States from the Republic of Panama approximately One Hundred Fifty-Five (155) pounds of Heroin, a Schedule I controlled substance, in violation of Title 21, United States Code, Section 952(a),

2. To knowingly and intentionally possess with intent to distribute approximately One Hundred Fifty-Five (155) pounds of Heroin, a Schedule I controlled substance, in violation of Title 21, United States Code, Section 841(a)(1).

In furtherance of said unlawful conspiracy and to further the objectives thereof, the defendant FELICE BONNETTI, the defendant LOUIS BOYCE, also known as Louie, the defendant FRANCISCO SOLIMENE, the defendant JOSEPH AVERSO, and Benito Brendarbit, also known as Jose Francisco San Martin, named herein as a co-conspirator but not as a co-defendant, Americo Altamirano, named herein as a co-conspirator but not as a co-defendant, Cesar Altamirano, named herein as a co-conspirator but not as a co-defendant, Rafael Richard, named herein as a co-conspirator but not as a co-defendant, Guillermo Gonzalez, named herein as a co-conspirator but not as a co-defendant, Hector Castro, named herein as a co-conspirator but not as a co-defendant, and Carlos Ramirez, named herein as a co-conspirator but not as a co-defendant committed the following:

O V E R T A C T S

1. On or about the 28th day of May 1971, Hector Castro, named herein as a co-conspirator but not as a co-defendant, and Carlos Ramirez, named herein as a co-conspirator but not as a co-defendant rented a room in the St. Moritz Hotel in New York County.

2. On or about the 28th day of May 1971, the defendant FELICE BONNETTI, the defendant FRANCISCO SOLIMENE, and Hector Castro, named herein as a co-conspirator but not as a co-defendant, and Americo Altamirano, named herein as a co-conspirator but not as a co-defendant, and Carlos Ramirez, named herein as a co-conspirator but not as a co-defendant, met at the St. Moritz Hotel in New York County to discuss the importation of heroin into the United States.

3. On or about the 29th day of May 1971, at John F. Kennedy International Airport, within the Eastern District of New York, the defendant FELICE BONNETTI, and Hector Castro, named herein as a co-conspirator but not as a co-defendant, and Carlos Ramirez, named herein as a co-conspirator but not as a co-defendant, left the United States on board commercial aircraft.

4. In June 1971, the defendant LOUIS BOYCE, also known as Louie, drove an automobile from New York County to John F. Kennedy International Airport, within the Eastern District of New York.

5. During June 1971, at John F. Kennedy International Airport, within the Eastern District of New York, the defendant FRANCISCO SOLIMENE left the United States on board a commercial aircraft.

6. On or about the 4th day of July 1971, at John F. Kennedy International Airport, within the Eastern District of New York, the defendant FRANCISCO SOLIMENE entered the United States.

7. On or about the 6th day of July 1971, at John F. Kennedy International Airport, within the Eastern District of New York, Benito Brondarbit, also known as Jose Francisco San Martin, named herein as a co-conspirator but not as a co-defendant, entered the United States.

8. On or about the 8th day of July 1971, at John F. Kennedy International Airport, within the Eastern District of New York, Rafael Richard, named herein as a co-conspirator but not as a co-defendant, arrived in the United States in possession of approximately One Hundred Fifty-Five (155) pounds of heroin.

9. On or about the 8th day of July 1971, in New York County, the defendant FRANCISCO SOLIMENE, the defendant JOSEPH AVERSO, Americo Altamirano, named herein as a co-conspirator but not as a co-defendant, and Benito Brondarbit, also known as Jose Francisco San Martin, named herein as a co-conspirator but not as a co-defendant, met in a restaurant.

10. On or about the 9th day of July 1971, at John F. Kennedy International Airport, within the Eastern District of New York, Guillermo Gonzalez, named herein as a co-conspirator but not as a co-defendant, entered the United States.

11. On or about the 9th day of July 1971, the defendant FRANCISCO SOLIMENE, the defendant JOSEPH AVERSO, Americo Altamirano, named herein as a co-conspirator but not as a co-defendant, and Cesar Altamirano, named herein as a co-conspirator

but not as a co-defendant, met together in an apartment house at 310 West 47th Street, in New York County.

12. On or about the 9th day of July 1971, in New York County, the defendant JOSEPH AVERSO placed a telephone call to the defendant LOUIS BOYCE, also known as Louie.

13. On or about the 9th day of July 1971, Guillermo Gonzalez, named herein as a co-conspirator but not as a co-defendant, and Benito Brondarbit, also known as Jose Francisco San Martin, named herein as a co-conspirator but not as a co-defendant, met at the Hotel Edison in New York County.

14. On or about the 9th day of July 1971, in New York County, Benito Brondarbit, also known as Jose Francisco San Martin, named herein as a co-conspirator but not as a co-defendant and the defendant JOSEPH AVERSO, had a telephone conversation.

15. On or about the 9th day of July 1971, in New York County, the defendant JOSEPH AVERSO instructed Americo Altamirano and Cesar Altamirano to pick up a rented car, in which was secreted One Hundred Fifty-Five (155) pounds of heroin.

16. On or about the 9th day of July 1971, Benito Brondarbit, also known as Jose Francisco San Martin, named herein as a co-conspirator but not as a co-defendant, transferred a parking lot receipt to Americo Altamirano, named herein as a co-conspirator but not as a co-defendant.

17. On or about the 9th day of July 1971, Cesar Altamirano, named herein as a co-conspirator but not as a co-defendant, presented the aforementioned receipt to claim an automobile in a lot located in New York County.

18. In June 1971, in New York County, the defendant LOUIS BOYCE, also known as Louie, met with the defendant JOSEPH AVERSO, the defendant FRANCISCO SOLIMENE, and Americo Altamirano, named herein as a co-conspirator but not as a co-defendant.

(Title 21, United States Code, Section 846)

A TRUE BILL

Edmund F. Li

FOREMAN

Robert A. M.../ J. L.

UNITED STATES ATTORNEY
EASTERN DISTRICT OF NEW YORK

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA

-against-

FRANCISCO SOLIMENE,

Defendant.

:

: 71 CR 1281

:

:

United States Courthouse
Brooklyn, New York
May 19, 1972

B E F O R E :

HONORABLE GEORGE ROSLING, U.S.D.J.

LAURENCE FIELDS
OFFICIAL COURT REPORTER

1
2 APPEARANCES:3 EDWARD R. NEAHER, ESQ.,
4 United States Attorney for the
Eastern District of New York5 BY: GEORGE BASHIAN, JR., ESQ.,
6 Assistant United States Attorney.7 THEODORE ROSENBERG, ESQ.,
8 Attorney for Defendant.

9 * * * * *

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1 THE COURT: The U.S. Attorney in Francisco
2 Solimene. You are Francisco Solimene. The U.S.
3 Attorney is George Bashian, Junior?

4 MR. BASHIAN: Yes, sir.

5 THE COURT: Mr. Francisco Solimene, your lawyer
6 is Mr. Theodore Rosenberg, who stands beside you, is
7 that right?

8 THE DEFENDANT: Yes.

9 MR. ROSENBERG: That's right.

10 THE COURT: You are to be sentenced this morning,
11 Mr. Francisco Solimene, upon your conviction by a jury
12 verdict on March 22, 1972, under indictment, Docket
13 number CR 1281.

14 It is the Court's practice to make available
15 to the defendant, upon the day that he is to be
16 sentenced, a copy of the Probation Report. This is
17 the Court's practice.

18 I therefore turn it over to your attorney.
19 The reason I turned it over to the lawyer, instead of
20 directly to you, Mr. Solimene, is so that I get it
21 back from the lawyer when it has served your purpose.

22 But, the whole report is available to you. You
23 can read it and discuss it with your attorney or take
24 any other proper action.

25 Second call.

(Second call).

1 THE COURT: Are you ready, or do you want time?

2 MR. ROSENBERG: I would rather have him make
3 his motions.

4 (Third call.)

5 THE COURT: You are Francisco Solimene and
6 beside you stands your attorney, Theodore Rosenberg.
7 The Probation Department report which the Court turned
8 over to your attorney has been returned by him. The
9 Court made the report, however, available to you in
10 its entirety, Mr. Solimene.

11 The Court is about to impose sentence upon -you,
12 upon your conviction before me and a jury, which
13 found you guilty on March 22, 1972, under indictment
14 docket number 71CR1281.

15 Before the Court imposes sentence, however,
16 the Court will hear any motions that you or your
17 counsel wish to make. That right was reserved to you
18 at the time that the verdict of guilty was brought.

19 MR. ROSENBERG: Your Honor, I will join in the
20 motions of co-counsel.

21 THE COURT: You better make them. That's a
22 separate recording before the Reporter.

23 MR. ROSENBERG: My first motion then, is to set
24 aside the verdict as against the weight of the evidence.

25 THE COURT: The Court denies that. A jury
question.

1 MR. ROSENBERG: Well, co-counsel did indicate
2 there may be a basis for newly discovered evidence,
3 and accordingly, he asked this Court for an adjournment
4 of sentence.

5 Of course, I am not in a position to investigate
6 that. If it is something that is realistic and
7 substantial, perhaps we could have the adjournment of,
8 this sentence so that it could be investigated for
9 whatever it is worth and brought before the Court
10 before sentence is imposed.

11 THE COURT: I denied that. You can make your
12 motion.

13 I am not giving you special permission. I am
14 merely telling you what the fact is. You can make
15 the motion under the rules, within the period limited
16 by the rules.

17 MR. ROSENBERG: The defendant is ready for
18 sentence, your Honor.

19 THE COURT: Mr. Francisco Solimene, before the
20 Court imposes sentence upon you, the Court is required
21 to give you an opportunity to address the Court to
22 make any statement.

23 THE DEFENDANT: I am not guilty.

24 THE COURT: To furnish any information as you
25 deem appropriate with a view to getting the Court to

A. 19

1 mitigate that, as to reduce the punishment that you
2 face.

3 You may, if you wish, address the Court yourself,
4 or you may have your attorney speak for you; or if it
5 is your desire, both may be given an opportunity to
6 address the Court, and you may, in such later event,
7 indicate who it is that you want to speak first.

8 MR. ROSENBERG: Your Honor, the defendant
9 indicates that he has nothing to say to the Court.

10 THE COURT: Is that your desire?

11 THE DEFENDANT: Yes.

12 THE COURT: You want the attorney to address
13 the Court?

14 THE DEFENDANT: Yes.

15 MR. ROSENBERG: Your Honor, please, I am not
16 unmindful of the enormity of the crime. Nevertheless,
17 I would like to emphasize the fact the defendant
18 is a first offender. While he stands convicted before
19 this Court of a very serious charge, I am aware of
20 what the maximum is that can be imposed. Nevertheless,
21 I would ask the Court to consider any reduction off
22 the maximum, insofar as he is a first offender.

23 He is married, and from my observations of the
24 defendant and his wife during the course of my
25 relationship with this defendant, I for one, do not

1 feel that this is one of the classic cases, where a
2 man is that hardened a criminal where he cannot be
3 rehabilitated; because of the closeness of the relation-
4 ship that he was never ever involved before this.

5 I believe the Probation Report reflects there
6 is an outstanding charge someplace. But nevertheless,
7 he has never been convicted of anything. And I ask the
8 Court to consider a reduction off the maximum, because
9 I do believe that this defendant can be rehabilitated,
10 Judge.

11 THE COURT: Do you wish to add anything to what
12 your attorney has said, Mr. Solimene?

13 THE DEFENDANT: No.

14 THE COURT: All right. The Court will now
15 proceed therefore, to impose sentence upon you.

16 Mr. Francisco Solimene, the sentence is as
17 follows:

18 Mr. Francisco Solimene, upon your conviction
19 under indictment, docket number 71CR 1261; upon your
20 trial before the Court and a jury; the jury having
21 rendered a verdict of guilty on March 22, 1972; I
22 sentence you to the custody of the United States
23 Attorney General or his authorized representative, who
24 shall designate the place of your confinement for a
25 term of fifteen years, and place you on special parole,

1 as required by law, for a further term of 15 years.

2 THE DEFENDANT: May I say thank you?

3 THE COURT: If you wish.

4 * * * * *

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**United States Court of Appeals
FOR THE SECOND CIRCUIT**

Docket Nos. 72-1996, 72-1997

UNITED STATES OF AMERICA,

Appellee,

—against—

LOUIS BOYCE and FRANCISCO SOLIMENE,

Appellants.

BRIEF FOR THE APPELLEE

Preliminary Statement

Appellants Louis Boyce and Francisco Solimene appeal from judgments of conviction entered on May 19, 1972, in the United States District Court for the Eastern District of New York after a jury trial before the Honorable George Rosling, District Judge, convicting them of a conspiracy to smuggle into the United States and to possess with intent to distribute approximately 155 pounds of heroin, in violation of 21 U.S.C. § 846.* Boyce and Soli-

* The single-count indictment names two additional co-defendants, Joseph Averso and Felice Bonnetti, as well as seven unindicted co-conspirators. Since the co-defendants Averso and Bonnetti were not in custody at the time of appellants' scheduled trial, in March 1972, the trial of appellants was severed. On January 3, 1973, after the date of appellants' conviction, Customs Agents apprehended Averso in New York. He is currently confined pending trial before Judge Rosling, who, on January 26, 1973, upon the request of Averso's attorney, delayed setting a trial date in the case until March 2, 1973. Co-defendant Felice Bonnetti is still at large.

men were each sentenced to a term of imprisonment of 15 years and to a special parole term of three years. They are presently incarcerated.

On this appeal appellants raise no claim with respect to the sufficiency of the evidence upon which they were found guilty and convicted. Rather, the sole basis of this appeal is their claim that the trial court failed to comply with the provisions of 18 U.S.C. § 3500 in that it did not order the Government to furnish defense counsel with a certain trial memorandum prepared by the prosecutor, which memorandum related to the testimony of Americo Altamirano, the chief Government witness at appellants' trial.

Statement of Facts

(1)

The instant prosecution represents a further aspect of an international drug conspiracy which has once already been before this Court in *United States v. San Martin*, — F.2d —, decided November 10, 1972, slip op. 441. In that case Jose Francisco San Martin, Americo Altamirano, and Cesar Altamirano were tried and convicted for their respective roles in a conspiracy to import into the United States the same 155 pounds of heroin which forms the basis of the instant prosecution. Only San Martin appealed, and his conviction was affirmed by this Court. On October 6, 1971, the day after the jury's verdict of guilty in the San Martin trial, Americo Altamirano became a cooperating government witness and began supplying information to Customs Agents as to the identities and respective roles of other members of the criminal conspiracy of which he was a part (R. 785-91; see also Magistrate's complaint sworn to by Special Agent William McMullen, filed on December 4, 1971). The indictment in the instant case followed, and Americo Altamirano was the chief government witness at trial.

The evidence adduced by the government at trial established that Boyce, Solimene, and co-defendants Joseph Averso and Felice Bonetti were the principal architects of and participants in a major conspiracy to smuggle large amounts of heroin into the United States from South America. The conspiracy consisted of two groups, receivers and suppliers. The receiver group, composed of Boyce, Solimene, and Averso, using Averso's apartment at 310 West 47th Street in Manhattan as its headquarters, purchased heroin directly from the supplier group, which was headed by the co-defendant Bonetti and was based in South America.

More specifically, the evidence showed that during the early part of May, 1971, in New York, Bonetti enlisted the aid of Americo Altamirano, his friend of six years and a former business associate, in delivering a suitcase filled with what Bonetti said was heroin to a customer at 310 West 47th Street, Manhattan (R. 238-48, 409-13). Later, on the same night that this delivery was made, Bonetti and Altamirano met with appellant Solimene in a Manhattan restaurant, where Solimene gave Bonetti a wrapped parcel which Altamirano later saw contained approximately \$250,000, representing a partial payment for the heroin delivered earlier (238-40, 249).

The next day, at the Diplomat Hotel in Manhattan, Bonetti introduced Altamirano to Joseph Averso, who lived in Apartment 6B at 310 West 47th Street. At this meeting they discussed "merchandise" which was to come to the United States from South America (249-51). On subsequent occasions during the month of May, Bonetti, Averso and Altamirano met and had "many" discussions about narcotics (476-77). On one occasion, while on the street outside of his apartment on 47th Street, Averso introduced Altamirano to appellant Louis Boyce, saying "This [Boyce] is my companion, my associate" (R. 255).

Thereafter, sometime around May 26th, during the course of a conversation at the International Club, a bar located on 48th Street, near Averso's apartment, Averso told Bonetti that he was no longer interested in purchasing just a part of Bonetti's "merchandise," but henceforth wanted to buy all of it (R. 257). In response, Bonetti suggested that since he had partners in his operation with whom he must consult, a meeting of all parties should be held a few days hence at the St. Moritz Hotel, where he and his partners would be staying. Since Averso did not want to attend this meeting himself, he said to Bonetti "I will send you the fat one," referring to Solimene (R. 477, 255-57).

Two days later, on May 28, 1971, Solimene and Altamirano went to the St. Moritz Hotel where they met with Bonetti, Hector Castro, Carlos Ramirez,* and an old man named Cesar, in a fourth floor suite reserved for Castro and Ramirez (R. 255-57, 847-55). At the outset of the meeting, Bonetti introduced Altamirano and Solimene to the others, saying of Solimene, "This boy belongs to the family here and he's representing Joey and Luigi [Louis Boyce]" (R. 258). Next, Bonetti told Solimene that he and his partners had agreed to do business with Solimene, that the price would be the same as before, and that payment must be made in large bills and upon receipt of the merchandise (R. 261). Bonetti said he planned to deliver approximately 200 kilograms of heroin per month into the United States. These would arrive in 70 kilogram shipments spaced about 8-10 days apart (R. 262, 495). Solimene agreed to Bonetti's terms, saying that there was "no problem" (R. 263). Bonetti further explained that eventually Solimene would have to travel to South America to meet the person who would be responsible for actually bringing the heroin into the United States (R. 263-65).

* Although not named as defendants, Casto and Ramirez were named as co-conspirators in this indictment.

Solimene agreed to this. Bonetti told his partners that Americo would be "at Joey's and his boys' disposal," working with them in New York (R. 497).

When the meeting adjourned, Solimene and Altamirano went to Averso's apartment, where Averso and Boyce were waiting for them. Altamirano and Solimene explained what had transpired to Averso in Spanish and Italian. Then, after Averso had spoken in English to Boyce, the latter said "OK, OK, very good," to Americo, making a circular sign with his thumb and forefinger" (R. 265-69).*

The next day, May 29, 1971, in the early evening, Averso and Altamirano drove Bonetti, Castro, and Ramirez from the St. Moritz Hotel to John F. Kennedy Airport, where Castro and Ramirez boarded an Aerolineas Argentina flight for Argentina and Bonetti boarded a Pan American flight for Argentina (R. 269-73, 960-74, 901-16).

Approximately two weeks later, Bonetti called Averso's apartment from Rome, Italy, and spoke to Joseph Averso, advising him that he (Bonetti) was going to Argentina, that everything was ready, that he would call Averso's apartment again in a few days, and that they all "should be waiting" (R. 274-75). Following this phone call, Americo Altamirano moved into Averso's apartment and became responsible for manning the telephone on an almost 24-hour basis.

A few days after Bonetti's call from Rome, he again called the apartment, this time from Argentina, and spoke to Altamirano. Bonetti left the somewhat cryptic message for Averso that "Franco's [Solimene's] aunt has died" and that Solimene should travel immediately to Buenos Aires and stay at the Diplomat Hotel. Bonetti stated he would

* Americo Altamirano, who spoke fluent Spanish and Italian, had only a limited understanding of English.

pick Solimene up at the hotel and take him to the funeral home (R. 275-76). After Americo related this message to Averso, the latter called Solimene and Boyce on the telephone, telling them to come quickly to the apartment (R. 565-67). Boyce arrived shortly thereafter, and after Averso explained to Boyce that Solimene was to travel to Buenos Aires, Boyce said "OK, very good" to Americo (R. 276-83). Boyce then left, and a short time later Solimene arrived at the apartment. After Averso explained the message to Solimene, the latter stated that he just recently obtained his passport and would be ready to travel as soon as he received the necessary vaccinations (R. 283-85, 399).*

Three days after Bonetti's second phone call, on about June 29th, Solimene flew to Argentina from John F. Kennedy Airport, arriving in Argentina on June 30, 1971 (R. 286-92; Solimene's passport, Government Exhibit 23). Five days later, on July 4, 1971, Solimene returned to the United States and went immediately to Averso's apartment, where he met with Averso and Americo Altamirano (R. 316; Government Exhibit 23).** There Solimene related how he had been met by Bonetti in Buenos Aires and later introduced to San Martin,*** the man who would be coming to New York to deliver the heroin (R. 316-17). Solimene further explained that from Buenos Aires he, Bonetti and San Martin traveled to Uruguay, where they met with Armando Nicolay, another of Bonetti's confederates (R. 318, Government Exhibit 23). Before Solimene left Uruguay for the United States, San Martin advised him that he [San Martin] would be arriving in the United States

* Solimene's passport, Government Exhibit 23, was issued on June 11, 1971.

** Altamirano testified that during the time Solimene was out of the country, an individual named Eddy, another of Bonetti's associates, delivered 53 kilograms of heroin to Boyce for \$880,000 (R. 292-315). This heroin was not in evidence.

*** An unindicted co-conspirator in this case.

on July 6th, and planned to stay at the Edison Hotel. Solimene supplied San Martin with Averso's telephone number, in code (R. 318).

On July 6, 1971, San Martin arrived in the United States at John F. Kennedy Airport. He thereafter registered in the Hotel Edison, located at 47th Street and Broadway (R. 847-55; see also San Martin's passport, entered in Evidence as Government Exhibit 22). Two days later, on the evening of July 8th, San Martin met Solimene, Averso, and Altamirano for dinner at a restaurant. After Solimene had introduced San Martin to the others, San Martin told them that the person actually bringing the heroin to New York was expected on the following day, July 9th, and that San Martin would call Averso's apartment upon hearing from this person (R. 319-21).

At virtually the same time that this dinner meeting was taking place, on July 8th at 7:00 P.M., Rafael Richard* was arrested at John F. Kennedy Airport in possession of 155 pounds of heroin as he tried to enter the United States from Panama with a diplomatic passport (R. 142-178). After talking with Richard, Customs Agents took him and the heroin to the McAlpin Hotel in Manhattan, where Richard was to await the arrival from Panama of his uncle, Guillermo Gonzalez.** The agents secured a room for Richard at the McAlpin.

On the next day, July 9th, Guillermo Gonzalez entered the United States at John F. Kennedy Airport as a passen-

* An unindicted co-conspirator in the instant case who had been indicted along with San Martin and the Altamiranos in 71 Cr. 835. Richard, who cooperated with the Government, pleaded nolo contendere and received a sentence of three and one-half years imprisonment.

** An unindicted co-conspirator in the instant case who, like Richard, had been indicted in 71 Cr. 835. Gonzalez also cooperated and pleaded nolo contendere, receiving a sentence of 7 years.

ger on board a Braniff flight from Panama (R. 725). After passing through United States Customs, Gonzalez, who was at this point under surveillance, travelled to the McAlpin Hotel and went to Richard's room (R. 725-29). There he placed a telephone call to San Martin at the Edison Hotel.

At the time of this call, approximately 1:00 P.M., Americo Altamirano was with San Martin in the latter's hotel room. After San Martin finished talking to Gonzalez, he told Altamirano that "the person who was bringing in the heroin" had called and that everything was ready. He further told Altamirano to go tell Averso that he [San Martin] would call Averso's apartment immediately after he had "seen the man" (R. 323). Altamirano delivered this message to Averso in the apartment, who immediately called Boyce, saying "everything is OK" (R. 325, 921-22). Shortly thereafter, Solimene arrived at the apartment and was instructed by Averso to go tell Boyce "to bring the suitcase with one million dollars" (R. 328).

In the meantime, back at the McAlpin Hotel, Customs agents had arrested Gonzalez as soon as he completed his telephone conversation with San Martin. Gonzalez, agreeing to cooperate, gave certain information to the agents, who then rented a car, placed the bags of heroin in the trunk of the car, and parked the car in the APCOA Garage at Broadway and 32nd Street (R. 192-94, 729-33). Gonzalez was then given the parking lot receipt for the rented car and told that he should go through with whatever plans he and San Martin had made prior to the time he was arrested (R. 734).

Accordingly, Gonzalez, under surveillance, went to the Edison Hotel where he met with San Martin and gave him the parking lot receipt (R. 734-35, 886-88). San Martin then called Averso's apartment, spoke to Altamirano, and shortly thereafter delivered the car receipt to Altamirano on

47th Street outside of the Edison Hotel (R. 330, 819-22). Altamirano, who was now himself under street surveillance, returned to the apartment and gave the receipt to Averso, who became very upset when he learned that the car keys were not with the car receipt. Fearing possible discovery of the heroin, Averso offered Americo's brother, Cesar Altamirano, who was present in the apartment, \$1,000 to go and claim the car immediately. Cesar accepted, and Americo went with him "to see if anything happen[ed] to him" (R. 335).

Cesar and Americo then walked to the APCOA Garage, where Cesar presented the claim check for the car. After the car had been driven up the ramp to the street and as Cesar was getting into it, he was arrested. Americo was arrested moments later as he stood on Broadway at 30th Street (R. 803). Shortly thereafter, San Martin was arrested in his room at the Edison Hotel. Found among his possessions was a piece of paper containing Averso's telephone number in a coded form.

(2)

At the conclusion of Americo Altamirano's direct testimony the prosecutor, Mr. Bashian, delivered to defense counsel a copy of Altamirano's Grand Jury testimony, consisting of 18 typed pages. At that time he advised defense counsel that there was no Section 3500 material other than the Grand Jury minutes (R. 350). During the course of an ensuing *voir dire* examination of Special Agent William McMullen, ordered by the Trial Court at defense counsel's request, Agent McMullen testified that he himself never took any notes when he interviewed Altamirano and that on the occasions when Altamirano was interviewed by both himself and Mr. Bashian he did not observe Mr. Bashian taking any notes (R. 351-63).

Thereafter, when Mr. Bashian was asked by the Court whether he had taken any notes on those occasions, Mr. Bashian stated that he had taken "occasional jottings at several of the interviews," and that from those "jottings" he had prepared a series of questions which he put to Altamirano in the Grand Jury (R. 374).^{*} Mr. Bashian further stated that, since he was "not quite satisfied" with the questions he had used in the Grand Jury, he discarded the "jottings" and Grand Jury questions and then prepared 13 pages of trial notes which he said he "used . . . at the trial in questioning Mr. Altamirano" (R. 366, 374). These notes were marked as Court Exhibit 1 and were submitted to the trial court for an *in camera* inspection. The notes, all hand-written, consisted of 198 "questions" and 47 expected "answers." These "answers" were of varying length (See Appellants' Appendix, at pp. 8-17).

During the Court's *in camera* examination of these notes, he asked Mr. Bashian whether they were ever "read back to Americo Altamirano for the purpose of seeing whether they were adopted or approved by him?" Mr. Bashian replied that the notes were "never shown or read back to Mr. Altamirano, no" (R. 366). Subsequently, the trial court ruled that the notes did not qualify as a "statement" under 18 U.S.C. § 3500 and directed that they be returned to the prosecutor (R. 375-76).^{**}

^{*} The Grand Jury met in December, 1971.

^{**} After the Notice of Appeal had been filed by Mr. Krieger, counsel for appellants, Mr. Krieger informally advised Mr. Bashian of the nature of the legal issue he expected to raise on appeal. Mr. Bashian then offered to supply Mr. Krieger with a typed transcription of Court Exhibit 1. That transcript was delivered to Mr. Krieger and is reproduced in the appendix to appellants' brief.

ARGUMENT

The trial court properly held that the prosecutor's trial notes were not producible under Section 3500 of Title 18, United States Code.

Appellants urge that the trial court's failure to furnish defense counsel with the prosecutor's trial notes pursuant to the provisions of 18 U.S.C. § 3500 constituted reversible error. Their brief cites no legal authorities to support this contention.

The prosecutor's notes, prepared by Mr. Bashian for his own use, to serve as a guide in interrogating Americo Altamirano at trial, clearly do not constitute a "statement" of a witness as that term is defined in subparagraph (e) of Section 3500. *Palermo v. United States*, 360 U.S. 343 (1959); *Campbell v. United States*, 373 U.S. 487, (1963); *United States v. Ariles*, 337 F.2d 552 (2d Cir. 1964), *cert. denied*, 389 U.S. 906, 918 (1965); *United States v. Myerson*, 368 F.2d 393 (2d Cir. 1966), *cert. denied*, 386 U.S. 991 (1967).

The relevant portions of subparagraph (e) of Section 3500 define the term "statement" in the alternative as either:

"(1) a written statement made by said witness and signed or otherwise adopted or approved by him;"

or as

"(2) a stenographic, mechanical, electrical, or other recording, or a transcription thereof, which is a substantially verbatim recital of an oral statement made by said witness and recorded contemporaneously with the making of such oral statement." *

* Subpart (3) of subparagraph (e) additionally defines statement as "a statement, however taken or recorded, or a transcription thereof, if any, made by said witness to a grand jury."

It is the Government's position that these notes do not fall under either of these two definitions. First, as to subparagraph (e)(1), while it is true that the Supreme Court has held that an agent's notes taken during an interview and then read back to the witness and adopted by him would constitute a "written statement" made by the witness, see *Campbell v. United States, supra*, here the notes were never read back or shown to Mr. Altamirano for the purpose of seeing whether they were adopted or approved by him" (R. 366).*

Second, as to clause (2) of subparagraph (e), the Supreme Court, in explicating that clause, has noted that "only those statements which could properly be called the witness's own words should be made available to the defense for purpose of impeachment." *Palermo v. United States, supra*, at 352. In *Palermo* the statement consisted of a brief agent's summary of approximately 600 words, of a conference lasting three and one-half hours. It was made up after the conference and consisted of several brief statements given by the witness in response to questions of the agent. The Supreme Court, noting that the typed memorandum "clearly [was] not a virtually verbatim narrative of the conference but represent[ed] the agent's selection of those items of information deemed appropriate for inclusion in the memo," *id.* at 355, note 12, held that the statement was not producible under Section 3500. The Court reasoned that "summaries of an oral statement which evidence substantial selection of material, or which were prepared after the interview without the aid of complete notes, and hence rest on the memory of the agent, are not to be produced". *Palermo v. United States, supra*, at 352-53.

* See also *United States v. Ariles, supra*, wherein the Assistant's interview notes of a witness were never read back to the witness nor were they ever signed or initialed by the witness.

This Court specifically followed the above-quoted reasoning of *Palermo* in *United States v. Aviles, supra*, wherein an Assistant United States Attorney made interview notes of a witness but was selective in his note-taking in that he did not record all that the witness stated to him. *Aviles* held that the prosecutor's notes were not 3500 material.

In the instant case Mr. Bashian's trial notes themselves indicate that they are the result of a process of selection. Only 47 out of 198 "questions" have expected "answers." Those answers in many instances are in an abbreviated or shorthand form. Clearly, the notes are not a substantially verbatim narrative. Moreover, we would note, the "answers", rather than having been "recorded contemporaneously with the making" of Altamirano's statement, were "prepared after the interview without the aid of complete notes," and rest on the memory of Mr. Bashian. Compare *Palermo v. United States, supra*, at 352-53.

Although the Government recognizes that if a statement taken by a prosecutor falls within the definition of this section it must be produced, *United States v. Hilbrich*, 341 F.2d 555 (7th Cir.), cert. denied, 381 U.S. 941 (1965), here it was not Bashian's aim to provide a record of Altamirano's story. Rather, it was his purpose merely "to draft for his own use" a memorandum which would serve "as a guide in interrogating the witness" before the petit jury. Compare *United States v. Aviles, supra*, at 559; *United States v. Myerson, supra*. Since his notes clearly do not fall within either of the two definitions of the term "statement", it was not error for the trial court to deny defense counsel's request for production of these notes. Moreover, the fact that the trial court may not have noticed, as appellant argues, that the notes contained some "answers" is not relevant to a proper determination of this case because the notes themselves, as a matter of

law, did not constitute a "statement" under the definitions enunciated in subparagraph (c). Even if the Court had seen the several "answers", this still would have had no bearing on the issue of whether or not these notes constituted a witness' "statement" under 18 U.S.C. § 3500.

CONCLUSION

The judgments of conviction should be affirmed.

Respectfully submitted,

February 21, 1973

ROBERT A. MORSE,
*United States Attorney,
Eastern District of New York.*

L. KEVIN SHERIDAN,
GEORGE G. BASHIAN, JR.,
*Assistant United States Attorneys,
Of Counsel.*

For the
Eastern District of New York

United States of America)	
)	
Vs.)	
)	
Francisco Solimene, et al,)	Case No. 71-Cr. 1281
)	
Defendant)	
)	
)	

Motion Pursuant to rule 35 of the
Federal rules of Criminal Procedure

Comes now Francisco Solimene, the defendant in the above entitled cause, who respectfully Petition this Honorable Court to reconsider the harsh sentence of 15 years and 15 years special parole imposed on May 20th, 1972, in the above entitled cause; the petitioner having exhausted his right of appeal, respectfully make's this application for a reduction of sentence within the 120 days provided therefore, in rule 35, F.R.C. P., for the followin reasons among others:

The petitioner will not burden this Honorable Court with a long recitation of petitioner's past history; for the facts relevant thereto, are contained in petitioner's pre-sentence report; nor does petitioner have a long list of accomplishments to parade before the court. But, I would call to the court attention that; I am 40 years old, I have a wife and a daughter 12 years old. I would also call to the court's attention; that this is my first and only felony conviction.

Petitioner does not have a list of legal reasons to cite to this court, as justification for a reduction of sentence; since the sentence no matter how severe was within the discretion of the trial court. But petitioner respectfully believe, that the 120 day provision of the rule 35, F.R.C.P., was created, so that a trial judge could temper justice with mercy, outside of the atmosphere of impassioned pleas of prosecutors and trial attorneys. In the instant case the prosecutor made it abundantly clear; that the petitioner was not a major figure in the alleged criminal venture; as the prosecutor said:

"There were layers and layers of people between him. The very first layer was the layer of Guillermo Gonzales and Raphael Richard, above that was the layer of Sanmartin, next came poor Mr. Solimene," (see trial transcript P. 1182-82-84-85)

The petitioner although only a minor figure received the longest sentence, which was a sentence of 15 years in the custody of the United States Attorney, and 15 years special parole thereafter. Petitioner is not attempting to raise a question of disparity of sentence, since the sentence no matter how harsh, was within the court's discretion; what the petitioner is requesting is, that this Honorable Court acting within its authority as provided by rule 35; review and reconsider the sentence imposed on this petitioner, and that the sentence be reduced to one lesser in nature.

Wherefore, the petitioner respectfully pray this Honorable Court to reduce the sentence heretofore imposed, in the above entitled cause, and for all other relief right and proper in this premise.

Respectfully submitted;

/s/ Francisco Solimene
Francisco Solimene, Petitioner, Pro se
Reg. No. 75818-158, Qtrs. A-313
Post Office Box 1000
Leavenworth, Kansas 66048

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA

71 CR 1281

-against-

Memorandum of Decision
and Order

FRANCISCO SOLINENE,

Defendant.

March 11, 1972

Defendant moves to reduce the sentence imposed on May 20, 1972 by Judge George Rosling.¹ Defendant was convicted after trial before a jury on a charge of conspiracy to import 155 pounds of heroin (95% pure) from Panama. Defendant was sentenced to a maximum term of 15 years, plus a special parole term of 15 years.

The defendant describes himself as a "minor figure" in the conspiracy. The presentence report relating the details of the conspiracy indicates that defendant was a major participant in the conspiracy. On May 28, 1971, at

¹ Judge Rosling died in April, 1973. This case was assigned to the writer under a rotation procedure adopted by the court for the distribution of matters pending before Judge Rosling.

the St. Moritz Hotel, defendant agreed with one Felice Bonnetti and others to finance the cost of large shipments of heroin imported from South America. Defendant traveled to South America and met with one San Martin, also known as Benito Brondarbit, and arranged for the importation of the heroin. The heroin was seized on July 8, 1971, when the suitcases of one Rafael Richard, Jr., son of the Panamanian Ambassador to China, was searched. The Government seized a safe deposit box maintained by the defendant containing \$87,000 in cash.

There is no reason advanced for disturbing the sentence imposed.

Motion to reduce the sentence imposed is denied and it is

SO ORDERED.

The Clerk of the Court is directed to forward a copy of this memorandum of decision and order to the defendant.

U. S. D. J.

ONLY COPY AVAILABLE

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,

VS

FRANCISCO SOLIMENE, ET AL,

IN CLERK'S OFFICE
DISTRICT COURT E.D. N.Y.

MAR 26 1974

TIME AM..... P.M.....
CASE NO. 71 CR 1281

MOTION FOR REVIEW PURSUANT TO RULE 35 OF
FEDERAL RULES OF CRIMINAL PROCEDURE: FOR
THE DENIAL ORDER OF MARCH 11th, 1974.

COMES NOW, Francisco Solimene, defendant herein, by pro se application, and moves the Court to review it's Order of March 11th, 1974; denying relief of his initial petition for reduction of the sentence imposed on May 20th, 1972; and in support thereof, states as follows:

The initial term of custody imposed in this cause was a maximum term of 15 years, plus a special parole term of 15 years. All being considered, the custody of the defendant, be it physical or supervision, is a sum total of 30 years.

The Court, in denying the initial Rule 35 motion of January 29th, 1974 refers in pertinent part to the presentence report that has indicated the defendant as being a major participant in the conspiracy that eventually brought about this conviction. Additionally, defendant is viewed as being the "King Pin", so to speak, while in

essence the opposite is what the Government described him in it's summation of the trial that brought about the conviction.

A perusal of the appendix attached hereto, it is submitted that, the emphasized lines (underlined) bring forth fruit substantiating the misrepresentation of the defendant as being the "King Pin". There must be some error along the way, because when the Government relies so strongly and specifically to evidence to bring out in summation to obtain a conviction, they must surely be right and call the matter as they see it without tainting the evidence.

The Court imposed a 30 year sentence on the defendant and he alleges that the sentence imposed is not consonant with sentences imposed by this Court in other such cases, and that, he has somehow been singled out and subjected to a sentence which is excessive and entirely out of keeping with sentences imposed generally by this Court in comparable cases.

Defendant, in addition, asks this Court to reconsider the sentence imposed upon him in a realistic light with a view toward what the United States Board of Parole will actually do and not toward what it will be capable of doing with a view toward sentences imposed in comparable cases in this Court. This is a narcotic conviction and the Board of Parole tends to view these offences in a different light.

Review of the pertinent facts relative hereto, defendant is 41 years old; married with a 12 year old daughter; he has never been convicted of a felony or any such crime. This exemplary ~~conviction~~

record, plus his conduct and work record since being confined, and the readjustment in these past 2 odd years, should have substantial consideration favorable to him. It will manifest that punishment has been achieved and the process of rehabilitation has commenced. The defendant has not only brought shame and hardships upon himself, but to his family as well, who seem to suffer along with him. Surely a 30 year sentence in this day and age can only be viewed as punitive rather than a rehabilitation term. All considered, with the record speaking for the defendant, this exemplary record could warrant the tempering of justice with mercy.

Justice will surely be served regardless of the term, but, to consider further, stating again, would not the family of the defendant, suffer the difficulties and hardships. The defendant once again asks the Court to look upon this motion with compassion and mercy.

WHEREFORE, Defendant, Francisco Solimene, moves the Court to reduce the sentence of 15 years imprisonment and 15 years special parole, to some other and lesser sentence which shall be proper and just in the premise. It is ever prayed this Court will so decide and adjudicate.

Respectfully submitted,

Francisco Solimene

Francisco Solimene
Reg. No. 71848-153
U.S. Penitentiary
P.O. Box 1000
Leavenworth, Kansas 66042

I hereby certify that I have placed a true copy of the foregoing in the mails postage prepaid to the United States Attorney; U.S. District Court; New York this 21 day of March, 1974.

[Signature]
C. R. GALEY PAROLE OFFICER
U.S. PENITENTIARY
LEAVENWORTH, KANSAS 66042
AUTHORIZED BY ACT OF JULY
7, 1955, TO ADMINISTER
PAROLE (28 U.S.C. 6113)

1
2 a direct connection between the contraband in this
3 case, namely the heroin, and Louis Boyce, and this
4 is true. But here's the important question that
5 you have to ask yourselves. Is that fact so be-
6 cause Louis Boyce has no connection with the con-
7 spiracy, or is it so because Louis Boyce is the
8 manager of the conspiracy who has removed himself
9 from direct contact. Go back, if you will, to the
10 analogy of a business corporation. The business
11 manager, the president of the corporation, does
12 not get out and sell the product himself on the
13 street. He does not sit there and make the product
14 in the factory. Because you do not see him in
15 the factory, because he is behind that closed
16 door, which says "President, do not enter," does
17 that mean he is any less in charge of the thing?
18 Of course not. Look what Louis Boyce did to pro-
19 tect himself and insulate himself from any direct
20 contacts that might occur with the contraband.
21 There were layers and layers of people between
22 him. The very first layer was the layer of
23 Guillermo Gonzalez and Raphael Richard. Above
24 that was the layer of Senacartin, next came poor
25 Mr. Solisano, and then came Joseph Avanzo and

1 the entire operation that was based in Joseph
2 Averso's apartment. All those layers, if you
3 will, interceded between Louis Boyce and the actual
4 contact with the heroin. This is just how it was,
5 and just how it should be in any kind of large
6 scale operation. One thing Louis Boyce doesn't
7 want, he doesn't -- He wants to minimize his con-
8 tact with that heroin. Look at how effectively
9 it worked. Solimane makes a trip to South America,
10 Sanmartin, he's the one that brings the heroin in,
11 the apartment which is their headquarters is Joseph
12 Averso's. All these layers insulate Mr. Louis Boyce
13 from the actual day-to-day contact with that heroin.

14
15 There is one interesting question that you
16 are going to want to ask yourselves: What is the
17 relationship of Solimane, Averso and Louis Boyce?
18 In other words, are all three of these people equal,
19 or is one partner more equal than the other? The
20 way you are going to determine this, I think, or
21 the way I would suggest, is by examining the way
22 these three men talk to each other, the way they
23 treat one another, and the different roles they
24 perform. On these exiterias, Solimane is clearly
25 not the top dog of this receiver group. He is

1 the one assigned by Joseph Averso to attend a
2 meeting as the representative of Louis Boyce and
3 Averso, and he reports back, and then the decision
4 is made by Averso and Boyce. He is the one that
5 takes the trip to Buenos Aires, risks exposure,
6 risks entries being made into his passport. Not
7 Boyce, not Averso. He is the one person who people
8 are always calling on the telephone, saying, "Come
9 quickly, Patty, we have something for you to do."
10 He's not the top dog. You can tell that by the
11 way people treat him, the way he acts, and the
12 things he does.

14 Averso is a little superior to Solimene.
15 He, too, insulates himself. How does he do it?
16 The telephone that he has is unlisted, not only
17 unlisted, but it is under Linda Cabral's name.
18 He doesn't attend the meeting wherein heroin is
19 discussed. He sends Solimene. He doesn't go to
20 South America, he sends Solimene. He never drives
21 a car, he sends Americo. He has people generally
22 talking on the phone for him, so he, too, insu-
23 ates himself.

24
25 (continued on next page.)

Now, how is Louis Boyce treated? In what regard is he held? The first introduction we have to Louis Boyce is when Averso introduces Boyce to Americo and says, "This is my associate." The next significant interplay that we see is when Averso instructs Solimane that he is supposed to go to Buenos Aires. Solimane asks, "Does Luigi know about it?" Joe Averso says, "Yes, he knows about it, and he says that you should go immediately down there." You can see that Joseph Averso and the others hold Luigi in a little bit of respect. When he send Americo to pick up the heroin from Eddy, he tells Americo, "Make sure you don't try to beat Louis Boyce out of his heroin." Joseph Averso is the one who has to assure Boyce not to worry, that the heroin will arrive safely, that Boyce is in effect working with professionals. There is a certain amount of deference, if you will, that is shown to Louis Boyce. The most important thing is that Luigi is the money man. He is the one that always shows up with the money. So, from all these little vignettes, if you will, of what we have seen, you may come to the point where you ask yourselves, What role does Louis

1
2 Boyce play in the conspiracy? Remember again,
3 the top manager in business is the one who is
4 involved in the crucial decisions, conceiving
5 policy, making plans to execute the ideas that
6 he has, and he leaves the day-to-day operation
7 to underlings. Look at Louis Boyce. When is it
8 that he shows up? When is it that he appears in
9 this conspiracy? The first time he shows up is
10 on the 23th day of May when the all-important
11 decision is being made whether or not the Luigi,
12 Joseph Averso, Solimene trio is going to be the
13 principal receivers. He's there when that deci-
14 sion is made. When does he next show up? He next
15 shows up when he decides with the others to send
16 Solimene to South America to actually start the
17 ball rolling, to bring the heroin in.

18 When does he next show up in the picture?
19 He is next called to bring the money to the apart-
20 ment for the 70 kilograms. In other words, all
21 the vital points, in all the significant moments,
22 Louis Boyce appears, making a decision, giving
23 instructions, or performing an important act. For
24 the rest of it, he disappears, leaving the day-to-
25 day functioning to others. He does not care who's

Manufacturers Hanover Trust
2760 Broadway
New York, N. Y.
Jan 4-1972

I Cilotte C. Solimene hereby make the following free voluntary statement to John Murray and Thomas Hayes known to me as Security Officers of Manufacturers Hanover Trust Bank. I further state that I make this statement of my own free will and volition without duress or promises of any nature whatsoever. I voluntarily opened my safety deposit box #1310 in Branch #58 of Manufacturers Hanover Trust Co. located at 2760 Broadway, New York, N. Y. in the presence of John Murray and Thomas Hayes. My safety deposit box contained \$87,000 in U.S. currency and one \$100 Series E bond. The \$87,000 in currency was given to me by my husband Francisco to place in my safety deposit box. He told me he was going into business but did not say what type. My husband gave me the money in sealed paper bags on three or four occasions. He would not tell me how much money was in the package, or where he got it from when I asked him. I made four or five visits to the safety deposit box since I rented it in July 1971. I didn't know how much money was in the box when it was opened on Jan. 4-1971 and counted in my presence,

/s/Cilotte C. Solimene 1-4-72

Witnessed by:/s/Thomas J. Hayes 1/4/72

/s/John D. Murray 1-4-72

Manufacturers Hanover Trust
3760 Broadway
New York, N.Y.

Jan 4-1972

I, Lettie C. Solomon hereby make the following free voluntary statement to John Murray and Thomas Hayes known & known officers of Manufacturers Hanover Trust Bank. I further state that I make this statement of my own free will and volition without duress or promises of any nature or threats. I voluntarily opened my safety deposit box #1310 in Branch #58 of Manufacturers Hanover Trust Co located at 2760 Broadway New York, N.Y. in the presence of John Murray & Thomas Hayes. My safety deposit box contained \$7000 in U.S. Currency and one \$100. Series E bond. \$7000 in currency was given to me by my husband and placed in my safety deposit box. He told me was going into business but did not say what type. My husband gave me the money in sealed paper bags on three or four occasions. He would not tell me how much money was in the package, or when he gave it from when I asked him. I made four visits to the safety deposit box since I made it in July 1971.

ONLY COPY AVAILABLE

didn't know how much money was in the box
it was opened on Jan 4-1971 and counted in
my presence.

Charlotte C. [unclear]	1-4-72
John D. [unclear]	1/4/72
John H. Murray	1-4-72

[STATEMENT OF CILOTTE C. SOLIMENE]

Jan. 4, 1972

I, Cilotte C. Solimene hereby state that I have given permission for Mr. John Murray and Mr. Thomas Hayes, members of the Security Dept. of Manufacturer's Hanover Bank to be present at the opening and examination of its contents of my safety box #1310 at Branch #58 located at 2760 Broadway, New York, N.Y. at 2:55 P.M. on January 4-1972. The contents consisted of three sealed paper bags which contained the following amounts of money, \$7800 in 100 dollar bills and \$9,200 in 50 dollar bills for a total amount of \$87,000 dollars. This money was counted in my presence and the presence of the security members by Mrs. Grace Finn head teller. The box also contained a Series E Bond #E5070027785

/s/ Cilotte C. Solimene 1-4-72

Witnessed by:/s/ Charles Rock 1/4/72

/s/ John D. Murray 1-4-72

/s/ Thomas J. Hayes 1/4/72

Jan 4, 1972

I, Abbot C. Schenck hereby state that I gave permission for Mr. John Drury, Mr. Thomas Hayer, members of the Board of Manufacturers Hanover Bank to be present at the opening and examination of the contents of my safety box #1310 at Box #50 located at 2760 Broadway, New York, N.Y. at 2 P.M. on January 4, 1972. The contents consisted of three sealed paper bags which contained the following amounts of money: \$15.00 in dollar bills and \$7200 in 50 dollar bills. Total amount of \$7,215.00 dollars. This money was counted in my presence and the government security members by Mrs. Grace Schenck. The box also contained a letter E and C 5070027.

Abbot C. Schenck 1-4-72

John Drury 1/4/72

John Drury 1-4-72

Thomas Hayer 1/4/72